

(2009) 08 DEL CK 0377
In the Delhi High Court
Case No : Criminal Appeal No. 679 of 2001

Durga Prasad @ Bablu

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 319
Penal Code, 1860 (IPC) — Section 302, 307, 32, 34, 35

Citation : (2009) 08 DEL CK 0377

Hon'ble Judges : P.K. Bhasin, J;B.N. Chaturvedi, J

Bench : Division Bench

Advocate : Anu Narula, in Criminal Appeal No. 679 of 2001, Sumeet Verma, in Criminal Appeal No. 731 of 2001, T.S. Khahar, Criminal Appeal No. 168 of 2003 and Arvind Kumar Patel, in Criminal Appeal No. 204 of 200, for the Appellant; Richa Kapoor, APP, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Bhasin, J.—The four appellants have called in question the correctness of the judgment dated 20th August, 2001 passed by the Court of Additional Sessions Judge, Delhi in Sessions case No. 188/97 whereby all of them have been convicted u/s 302/34 IPC for having murdered one Amit Gupta on 10th January, 1997. Since all the three appeals arise of same judgment of the trial Court and were heard together we propose to dispose them of by this common judgment.

2. The prosecution case leading to the trial and conviction of the four appellants has been noticed by the trial Court in its judgment and relevant portions therefrom are re-produced below:

On 10.1.97 an information was received from RML Hospital which was recorded as DD No. 29A in P.S. Parsad Nagar. Information was regarding admission of one Amit Gupta in the hospital in injured condition. On the basis of this information SI Babbar Bhan along with Constable Manohar Lal reached in the hospital and

collected the MLC of injured Amit Gupta but the injured Amit was declared unfit for statement by the doctor and the nature of injuries were opined as sharp. In these circumstances statement of injured could not be recorded by SI Babbar Bhan but the statement of his father Sat Sagar Gupta was recorded who was found present in the hospital. He had stated that he was staying in H. No. 16/918 E, Khalsa Nagar, Tank Road, Karol Bagh, New Delhi along with his family members and was doing the business of readymade garments and that on that date he was present in his house along with his family members and had taken the dinner, when at about 10.30 PM someone called his son Amit and thereafter Amit went out. After some time noise was heard from outside the house and on hearing this noise he along with his son Parveen came out and saw four boys beating Amit. He had further stated that Rajinder and Bablu were holding the hands of Amit and one boy whose name he did not know but whom he could identify, was holding Amit from the neck and Biloo who was staying in Karol Bagh hit Amit with knife on his chest and left thigh. Amit fell down and seeing them, all the boys ran away. He with the help of his son Parveen removed Amit to RML Hospital. On this statement SI Babbar Bhan made an endorsement and send rukka for the registration of the case to police station. Thereafter FIR u/s 307/34 IPC in this case was registered. SI Babbar Bhan returned at the spot along with Sat Sagar Gupta and continued his investigation. He prepared site plan and photographs of the spot were also taken and the earth control with blood and without blood were also collected from the spot. Injured Amit Kumar expired on 11.1.97 and he could not make any statement and after his death FIR was converted for the offences u/s 302/34 IPC and the investigation was handed over to Inspector Ishwar Singh. The post-mortem of deceased Amit was conducted.....On 12.1.97 accused Rajinder and Durga Prasad @ Bablu were arrested by Inspector Rajinder Singh at the instance of complainant Sat Sagar Gupta, who at the time of their arrest stated that they have been falsely implicated since a civil case regarding vacation of the tenanted premises is pending between them. On that very date i.e. 12.1.97 on the identification of Parveen Gupta, accused Lajpat @ Biloo and Madan Gopal were arrested from Madipur....

3. The aforesaid incident was sought to be established by the prosecution from the evidence of two eye witnesses who were the father and brother of the deceased and the learned trial Court accepted their evidence and based on their evidence held all the four accused persons guilty of the offence of murder and vide separate order dated 23rd August, 2001 sentenced them to undergo life imprisonment and also to pay fine of Rs. 15,000/- each and in default of payment of fine were ordered to undergo simple imprisonment for one year. Feeling dissatisfied with the verdict of the trial Judge all the four convicted accused have come up in appeal.

4. The learned Counsel for two accused-appellants Rajinder Kumar @ Raju and Durga Parsad @ Babloo, both of whom are real brothers, started the attack on the trial Court's verdict with the argument which appeared to be the strongest

weapon in their armoury. That weapon was used in the trial Court also but did not have any effect on the learned trial Judge. It was contended that after the investigation was completed the investigating agency had not been able to collect sufficient material during investigation against these two accused and so their names were kept in column No. 2 of the charge-sheet meant for persons who are not sought to be tried. Learned Counsel argued that since the investigating agency itself had not asked for the trial of these two accused the Metropolitan Magistrate before whom the charge-sheet was submitted could not have taken cognizance against them and only if during the trial in the Sessions Court some evidence had come against them from the side of the prosecution that they could be summoned as accused by the Sessions Court in exercise of the powers u/s 319 of the Code of Criminal Procedure, 1973. So, the trial of these accused was unconstitutional and their conviction cannot be sustained. In support of this contention learned Counsel also placed strong reliance on two decisions of the Supreme Court reported as State of M.P. Vs. Bhagwan Singh and Others, , "Kishori Lal v. State of Bihar". This argument when raised before the trial Court was repelled by the learned Additional Sessions Judge on the ground that these accused had not challenged the order dated 01/09/97 when charges were framed against them alongwith their two co-accused persons after rejecting the same submission which had been advanced at that stage also. We are in full agreement with this reasoning of the trial Court given for rejecting the argument that the trial of these two accused was illegal.

5. Even otherwise also the controversy whether someone kept in column No. 2 of the charge-sheet by the police can be summoned as an accused by the Magistrate stands set at rest by a judgment of the Supreme Court which was pronounced after the judgment in Kishori Singh's case(supra) relied upon by the learned Counsel for the appellants-accused Rajinder Kumar and Durga Parsad. That judgment is reported as M/s. SWIL Ltd. Vs. State of Delhi and Another, wherein the Supreme Court after taking note of its earlier three Judge Bench in the case of Raghubans Dubey Vs. State of Bihar, had come to the conclusion that the Magistrate can summon even the person kept in column No. 2 of the charge-sheet as an accused even when the police had come to the conclusion that no case was made out for the trial of that person.

6. Coming now to the merits of the prosecution case, it may be noted that the learned Counsel for all the four appellants did not dispute the fact that the deceased had been murdered and this is not a case of natural death. That fact even otherwise is duly established by the medical evidence adduced by the prosecution. The autopsy surgeon PW-3 Dr. Anil Kumar has deposed that while conducting post- mortem examination of the dead body of the deceased he had noticed the following external and internal injuries:

External Injuries

1. Incised stab wound 2.5 x 1 cm x Chest cavity deep over left side chest. The lower inner angle was blunt vide the outer upper angle was acute. The margins

were clean cut. The lower inner angle was 5.5 cm outer to left nipple while outer angle was 6.5 cm below anterior axillary fold.

2. Incised stab wound 2.5 x 0.4 cm x 10.5 cm deep present over middle outer of left thigh. The direction of the wound was upwards, inwards and backwards.

Internal Injuries

...The left side front of chest wall showed incised wound 2.5 cm long in 4th intercostals space underneath injury No.

1. ...Left lung showed a cut 2 cm long over lower front of upper lobe. A cut 1.8 cm long present over lower surface of upper lobe in continuation with above cut. Heart showed a cut 1.8 cm long over pericardial surface.....A cut 1.6 cm present over front of left ventricle.....

Track of injury No. 1: Injury No. 1 entered the left chest after passing through 4th intercostal space on the left side. Entered the left plural cavity and then upper lobe of left lung. Passed through and through the left lung and entered the left vertical of heart. The injury finished in the left ventricle cavity.

PW-3 deposed that in his opinion the cause of death was due to haemorrhage and shock consequent upon stab injury to left lung and heart via injury No. 1. All the above-noted injuries were ante-mortem, recent in duration and could be caused by a single edged sharp weapon and injury No. 1 was found to be sufficient to cause death in ordinary course of nature. The doctor who had initially examined the deceased on being brought to the hospital(PW-2 Dr. Dheeraj) had noticed a deep lacerated wound on the left upper chest below the second rib with a size of 2 cm x 1 cm and another deep lacerated wound in the left middle thigh on the anti-lateral aspect with a size of 2 cm x 1 cm. This evidence clearly establishes that the deceased died homicidal death.

7. Now, the question which we are to consider is whether the prosecution has been able to prove beyond reasonable doubt that the death of the deceased was caused by all the four accused in furtherance of their common intention. The prosecution is relying upon the ocular evidence of the incident given by two eye witnesses, namely PW-9 Sat Sagar Gupta, who is the father of the deceased, and PW-8 Parveen Gupta, who is the brother of the deceased. The version of the complainant Sat Sagar Gupta as to how the incident occurred may be noticed in his own words. This is what he deposed about the occurrence in which his son Amit Gupta lost his life:

On 10.1.97 at about 10.30 PM I was present at my house at second floor with my family members. Two persons(two boys) had called my son Amit Gupta, from the downward and on this call my son Amit had gone to the ground. After some time I heard a noise regarding the quarrel after some time then I along with my son Parveen Gupta had gone to the ground floor. Then I had seen in the street that my son was being beaten by four persons, those four persons are the accused persons present in court today, out of whom I came to know Madan

Gopal later on. They took my son at the corner of gali where the board of Ganesh wali was there. Accused Rajinder Prasad and Durga @ Bablu had caught hold the hands of my son, accused Madan Gopal had caught hold neck of my son and accused Billu @ Lajpat had then given knife blows one on his chest and other on his thigh. After seeing us all the four accused persons had fled away from the spot and then we had taken the injured to hospital to RML Hospital. Police had reached the hospital and recorded my statement at the hospital and my statement is Ex. PW-9/A which bears my signature at point A. In the hospital my son had expired at about 2 am on 11.1.97, after about 2/3 hours of his admission.

8. PW-8 Parveen Gupta's version of the occurrence is also being reproduced below:

On 10.1.1997 at about 10.30 p.m. I was present at my house with my family members. At that time, two persons had called my brother Amit Gupta, from the downward and he had gone in response to that call. After some time I heard some noise regarding a quarrel, thereafter I along with my father had gone downside and I saw that two persons were taking my brother pulling and those two persons are Billu and Madan Gopal who were pulling my brother and two persons Raj Kumar and Bablu accused present in court were standing at the corner of street already. Accused Raj Kumar and Bablu had caught hold the hands of my brother, accused Madan Gopal had caught hold the neck of my brother from his back side and Billu known as Lajpat accused present in court had given the knife blows to my brother on his chest and left thigh. As we had reached there all the four accused persons had fled away from the spot and we took the injured Amit Gupta to RML Hospital and there at about 2 am on 11.1.97 he was declared dead.

9. The learned trial Court after considering the various infirmities pointed out in the evidence of PWs 8 and 9 by the counsel for the accused persons for rejecting the evidence of PWs 8 and 9 did not find any substance in the submissions advanced by the counsel and found the evidence of both the eye witnesses to be "unimpeachable. and relying upon the same held all the four accused guilty u/s 302/34 IPC and awarded sentence of life imprisonment to each one of them and also imposed on them fine of Rs. 15,000/- each vide order dated 23rd August, 2001.

10. The veracity of the evidence of the two eye witnesses was challenged by the respective counsel of the appellants on almost common grounds. It was contended that both the eye witnesses are interested witnesses being the father and brother of the deceased and so their evidence should not have been relied upon. Other ground of attack put forth on behalf of all the four appellants was that when the deceased was taken to the hospital by the two eye witnesses they did not disclose the names of the assailants to the doctor who had initially examined the deceased in the hospital and to whom it was only disclosed that the deceased had been stabbed in some incident and that was the only history

recorded in the MLC Ex.PW-2/A. Learned Counsel contended that absence of the names of the assailants in the MLC shows that by the time it was prepared none of the two witnesses knew as to who were the assailants and it was only after due deliberations that they thought of implicating all the four appellants because of previous enmity and strained relations and that was also evident from the fact that they allegedly made statements before the police around 1.30 a.m. only although the incident had allegedly taken place at about 10.30 p.m. It was also submitted that conduct of PWs 8 and 9 at the time of the incident was not normal inasmuch as they did not make any attempt to save the deceased from being assaulted and that abnormal conduct creates a serious doubt about their being the eye witnesses of the incident. It was also contended that even though these eye witnesses have claimed that their clothes had got smeared with the blood of the deceased while taking him to the hospital but the police having not seized any blood stained clothes of these witnesses their evidence becomes doubtful for that reason also because if actually they were present at the spot at the time of the incident and their clothes had got blood stained the police would have definitely taken their clothes in possession as a piece of evidence substantiating their claim of being the eye witnesses. Evidence of the two eye witnesses was also attacked on the ground that they had contradicted each other instead of corroborating on material aspects of the prosecution case. Another argument put forth for rejecting the prosecution case was that even the deceased himself had not named the assailants to the doctor in the hospital even though as per the MLC he was conscious when he was being examined by the doctor. 11. Counsel for appellants Rajinder Kumar and Durga Prasad also submitted that as far as these two accused are concerned admittedly there was landlord-tenant litigation going on between them and PW-9 Sat Sagar Gupta, the father of the deceased, who was their landlord and that was another reason to view the evidence of father and son, both of being highly interested witnesses, with suspicion since they had the motive to falsely implicate these two accused brothers. It was also submitted that the deceased himself had been a criminal involved in criminal cases as also his father PW-9 Sat Sagar Gupta and they were BCs(bad characters) of the area. Learned Counsel had drawn our attention to that part of the cross-examination of PW-9 Sat Sagar Gupta wherein he had admitted that one case u/s 376 IPC had been registered against him at Karol Bagh police station and another case u/s 380 IPC at Maya Puri police station and he also admitted that against his son Amit, the deceased, also a case u/s 25 of the Arms Act was going on when he was alive.

12. As far as accused Madan Gopal and Lajpat are concerned their counsel had also submitted that the investigating officer(PW-15 SI Babbar Bhan) had admitted in his cross-examination that when the deceased was in jail in connection with some case accused Madan and Lajpat were also in the same jail at that time and during their stay in the jail enmity had developed between the deceased and these two accused persons and so the evidence against these two accused persons given by the father and the brother of the deceased cannot be

relied upon as they had the motive to falsely implicate these accused with whom their son had enmity.

13. In support of their submissions some judgments of the Supreme Court reported as Kapildeo Mandal and Others Vs. State of Bihar, , Sohan and Another Vs. State of Haryana and Another, ,"State of Rajasthan v. Teja Singh", Bir Singh and Others Vs. State of Uttar Pradesh, , AIR 1978 Supreme Court 59 " Bir Singh v. The State of Uttar Pradesh" and Jagir Singh Vs. The State (Delhi), were also relied upon by the learned Counsel.

14. Finally, the counsel for appellants Rajinder Kumar, Durga Prasad and Madan Gopal submitted that these three accused in any event could not be held guilty for the offence of murder with the aid of Section 34 IPC even if the evidence of the two eye witnesses is totally relied upon. Learned Counsel cited some judgments also of Hon"ble Supreme Court in support of their submission on the non-applicability of Section 34 IPC in the facts and circumstances of this case. Those judgments are reported as 2001 SCC(Crl.) 668, "Mithu Singh v. State of Punjab", 2000 SCC(Crl.) 9, "Ramashish Yadav v. State of Bihar", 1999 SCC(Crl.) 74, "Ajay Sharma v. State of Rajasthan" and 1999 SCC(Crl.) 120,"Jagtar Singh v. State of Punjab". One judgment of a Division Bench of this Court was also cited and the same is reported as 89 (2001) DLT 237, "Raj Kumar v. State". One judgment of a Division Bench of this Court was also cited and the same is reported as 89 (2001) DLT 237, "Raj Kumar v. State".

15. The learned Addl. Public Prosecutor supporting the trial Court's judgment submitted that the prosecution case against all the appellants was flawless and evidence of the eye witnesses was unimpeachable despite the fact that they were related to the deceased and had some litigation also with accused Rajinder Kumar and Durga Parasd and some criminal cases were there against the deceased and his father and had been rightly found to be unimpeachable by the trial Court and so the appeals of all the four convicted accused deserved to be dismissed.

16. There is no doubt that both the eye witnesses in this case happen to be closely related to the deceased Amit, PW-9 being his father and PW-8 being his real brother. It is also not in dispute that there was some ligation going on between the eye witness PW-9 Sat Sagar Gupta and accused Rajinder Kumar and Durga Parsad and also that some criminal cases were there against PW-9 as well as the deceased. However, these are not the factors which by themselves can affect the credibility of a witness. A relation would not conceal actual culprit and implicate an innocent person. However, whenever guilt of an accused being tried for a serious offence like that of murder is sought to be established by the prosecution from the evidence of related witnesses the evidence of those witnesses has to be scrutinized and analysed with more care and caution. Same is the position when the accused and the witnesses are inimical to each other for some reason. Enmity is in any case a double edged weapon which can be used by the accused as well as the victim party. In the judgments of the Supreme

Court cited by the learned Counsel for the appellants the evidence of the eye witnesses of those cases who were related witnesses was disbelieved because of certain infirmities in their evidence and the prosecution case in general found by the trial Court as well as by the Supreme Court and not simply for the reason that they were interested or partisan witnesses. In none of the judgments cited on behalf of the appellants it has been held as a proposition of law that evidence of related witnesses or who have some kind of enmity with the witnesses must always be rejected for that reason alone. On this aspect we may make a useful reference to a judgment delivered by the Supreme Court way back in the year 1953 wherein it had, in fact, been observed that evidence of related witnesses can be relied upon even without corroboration. That decision is reported as Dalip Singh and Others Vs. State of Punjab, and this what was observed in paras 26, 27 and 28 of the judgment :

26. We are unable to agree with the learned Judge of the High Court that the testimony of the two eyewitnesses required corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in (Rameshwar Vs. The State of Rajasthan, . We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel.

27. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that here is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

28. This is not to say that in a given case a Judge for reasons special to that case and to that witness cannot say that he is not prepared to believe the witness because of his general unreliability, or for other reasons, unless he is corroborated. Of course, that can be done. But the basis for such a conclusion must rest on facts special to the particular instance and cannot be grounded on a supposedly general rule of prudence enjoined by law as in the case of accomplices.

17. This decision is being followed since then and even recently the Supreme

Court in "Bur Singh and Anr. v. State of Punjab" 2008 XI AD (SC) 161 has following the decision in Dalip Singh's case(supra) as also many other judgments rendered thereafter maintaining the same view regarding the worth of the evidence of related witnesses has held that evidence of related eye witnesses cannot be rejected on the ground that they were related to the victim of the crime. Relevant views were expressed in paras 6 to 12 of the judgment which are reproduced below:

6. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

7. In Dalip Singh and Others Vs. State of Punjab, it has been laid down as under:

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person....

8. The above decision has since been followed in Guli Chand and Others Vs. State of Rajasthan, in which Vadivelu Thevar Vs. The State of Madras, was also relied upon.

9. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires Corroboration....

10. Again in Masalti Vs. State of U.P., this Court observed: (p. 209-210 para 14):

But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated.

Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

18. Relying upon the various judgments of the Supreme Court referred to in these two judgments a Division Bench of this Court had also taken the same view in *State Vs. Ashok Kumar Pandey*, regarding the reliability of the evidence of related witnesses. So, the evidence of PWs 8 and 9 in the present case cannot be discarded simply for the reason that they are related to the deceased and also because some litigation was going on between them and accused Rajinder Kumar and Durga Parsad and there was enmity between the deceased and accused Madan Gopal and Lajpat.

19. We have independently examined and analysed the evidence of eye witnesses. We have found the evidence of PWs 8 and 9 to be consistent, cogent and wholly reliable and the intrinsic worth of their evidence has not been found to be in any kind of doubt at all. We have carefully considered the lengthy cross-examination of these witnesses conducted by the defence and found that material particulars of the prosecution case disclosed in the first information report as well as in their examination-in-chief are reaffirmed in the cross-examination. Careful scrutiny of evidence of PWs 8 and 9 clearly demonstrates that their being present at their house at the relevant time was natural. Similarly, testimony of these witnesses is cogent, straight-forward and consistent with the material particulars of the prosecution case disclosed in the first information report. Except for putting general suggestions to the witnesses that they were deposing falsely the defence has not really disputed presence of the appellants as well as the deceased Amit and these witnesses on the scene of occurrence nor the stabbing done by accused Lajpat as well as catching hold of the deceased by other three accused when he was stabbed by Lajpat. No contradictions on any material part with reference to their version of the occurrence before the police could be brought on record in their cross-examination. How a witness has fared in cross-examination can be a strong indicator of the reliability or otherwise of the witness in a criminal trial in particular.

20. The argument raised by the defence counsel that the evidence of PWs 8 and 9 should not be relied upon for the reason that they had not made any attempt to save the deceased when he was being stabbed cannot be accepted because both these PWs have claimed that on seeing them all the four accused had fled away from the spot. Similarly the submission that PWs 8 & 9 had not disclosed the names of the assailants either to the doctor in the hospital where the injured was taken after the incident or to the police constable on duty there and so for this reason also they should be disbelieved has also no force and needs to be rejected. As has been noticed already the incident had taken place around 10.30 p.m. and thereafter the injured was rushed to the Government hospital and there the constable on duty on coming to know that the deceased had got injured because of stabbing had informed the concerned police station. From the police

station Sub-Inspector had then reached the hospital within no time and had recorded the statement of the father of the injured since he had claimed to have witnessed the incident in which his son had got injured. It has not been elicited by the defence counsel from the doctor (PW-2 Dr. Dheeraj Bahal) or from the duty constable(PW-12 Const. Netra Singh) whether they had specifically asked the names of the assailants from the father and the brother of the injured or the injured himself. If such a question had been put to the duty constable in the hospital and they had said that despite their asking the witnesses to disclose the names of the assailants they had not divulged their named the position might have been different. As far as the witnesses are concerned they were not expected to first of all narrate the entire incident to the doctor or to any police constable in the hospital. Anxiety of anybody also in their position would have been to get the injured treated immediately by some doctor and this is what PWs 8 and 9 also did in this case. Since the injuries sustained by the deceased apparently appeared to be stab injuries to the doctor(PW-2) he would have asked the brother of the deceased, whose name was mentioned in the MLC to be the person who had brought the injured to the hospital, to confirm only whether the injuries were actually stab injuries or not since in case of stab injuries the case becomes Medico Legal Case of which the police needs to be informed. The doctor is not concerned about the details of the incident or names of the assailants. His job is to ensure that immediate medical aid is given to the injured and not to start interrogating the injured or the person bringing him to the hospital. In this regard we may refer to two judgments of the Supreme Court wherein also the same view was taken. In "Bhargavan v. State of Kerala" AIR 2004 SC 1058, which was cited by the learned Additional Public Prosecutor it was observed by the Supreme Court that:

20. So far as non-disclosure of names to the doctor, same is really of no consequence. As rightly noted by the Courts below, his primary duty is to treat the patient and not to find out by whom the injury was caused. The plea in this regard is clearly unacceptable. The question was examined by this Court in Pattipati Venkaiah Vs. State of Andhra Pradesh, and similar view was taken.

And this is what the Supreme Court had observed in Pattipati Venkaiah Vs. State of Andhra Pradesh, :

16. Another argument advanced before us was that although PWs 1 and 2 were supposed to be eye-witnesses, they never cared to disclose the name of the assailant to the doctor when the body of the deceased was taken to the hospital. This argument is only stated to be rejected. A doctor is not at all concerned as to who committed the offence or whether the person brought to him is a criminal or an ordinary person, his primary effort is to save the life of the person brought to him and inform the police in medico legal cases. In this state of confusion, PWs 1 and 2 may not have chosen to give details of the murder to the Doctor. It is well settled that Doctors before whom dead bodies are produced or injured persons are brought, either themselves take the dying declaration or hold the post-

mortem immediately and if they start examining the informants they are likely to become witnesses of the occurrence which is not permissible.

21. Same view was taken by a Division Bench of this Court also in Ashok Kumar Pandey's case(supra) and referring to the decision of the Supreme Court cited in that case on behalf of the convict(AIR 1997 SC 454) on effect of absence of the name of the accused in the MLC the Bench had observed in para No. 14 that: "It is to be noted that Apex Court nowhere laid down a rule that MLC must contain the name of the accused.".

22. Similarly the constable on duty in the hospital is expected to pass on the information to the concerned police station that some person with stab injuries has been brought to the hospital and some officer should be deputed to arrive there to investigate the matter. He himself may ask someone about the details of the incident or may not ask, and if he chooses not to ask the details it cannot be said that the persons who had brought the injured to the hospital had failed to disclose the names of the assailants at the earliest possible opportunity to the police. In the present case PW-12 Constable Netra Singh, who was the constable on duty at RML Hospital when the deceased was brought there in the night of 10-01-97 had himself stated in his cross-examination that:"I do not ask the name of the accused persons.....". In (1975)SCC 562, cited by the counsel for the appellants, the version of the two eye witnesses was not relied upon by the Supreme Court since they had not only not disclosed the name of the accused-assailant to the police constable on duty in the hospital where they had taken the victim after the incident but had kept mum for about 12 hours after the incident which had taken place at about 10 p.m. and after leaving the victim in the hospital they had left the hospital without informing the names of the assailants to anyone and came back in the morning around 11 a.m. and then only the investigating officer was narrated the incident by one of the eye witnesses. That is not the situation here.

23. Another ground urged by the learned Counsel for the appellants for discrediting PW-8 and 9 was that even though they claimed that their clothes had become blood stained while taking the deceased to the hospital but their blood stained clothes were not taken into possession by the investigating officer which he would have definitely done if actually these two witnesses were the eye witnesses of the occurrence and had shifted the deceased to the hospital immediately after the occurrence. According to the learned Counsel non-seizure of their blood stained clothes by the investigating officer renders their claim of being the eye witnesses highly doubtful. However, we do not find any force in this argument also advanced by learned Counsel for the appellant. There is no doubt that PWs 8 & 9 have both claimed that while lifting the deceased from the place of occurrence for taking him to the hospital their clothes had got blood stained and that the police did not seize their blood stained clothes. However, for that reason the reliable testimony of PWs 8 & 9 cannot be discarded. PW- 15 SI Babbar Bhan is the initial investigating officer of the case and he only had come

into contact with both the eye witnesses immediately after being entrusted with the investigation of the case. He has not claimed that he had noticed blood stains on the clothes of the two eye witnesses when he met them and in his cross-examination also it was not elicited by the defence counsel whether he had noticed blood on the clothes of PWs 8 & 9. In the absence of any such cross-examination of the investigating officer in this respect it also cannot be said that the investigating officer had not done his job diligently. On this aspect of the matter we may usefully make a reference to the following observations of the Hon"ble Supreme Court made in the case of "Bur Singh and Anr. v. State of Punjab" 2008 (XI) AD (SC) 161 in para No. 14:

...Merely because the investigating officer had not noticed any blood stains on the clothing of PW 3, that does not mean that PW 3 was telling a lie. PW 11 has stated that he had not noticed the blood stains. That is not the same thing to say that there was no blood stain. There can be several reasons for which blood stains may not have been noticed by PW 11 because he may not have focused his attention to that aspect....

There is no doubt that in the judgment of the Supreme Court 2001 (II) AD (SC) 125 which was cited on behalf of the appellants in support of the submissions that the investigating officer having not seized the blood stained clothes of PWs 8 & 9 their testimony deserve to be viewed with suspicion. One of the circumstances taken into consideration by the Court for not believing the eye witnesses of that case was the absence of seizure of blood stained clothes of the eye witnesses. However, the facts of that case are clearly distinguishable inasmuch as there were many other infirmities found by the Court in the prosecution case. In the present case we have not found any infirmity in the prosecution evidence.

24. The evidence of PWs 8 & 9 gets corroboration also not only from the medical evidence given by the autopsy surgeon PW-3 Dr. Anil Kumar, which we have already noticed, but also from the prompt registration of FIR in which PW-9 Sat Sagar Gupta had narrated the entire incident to the investigating officer who had reached the hospital from the police station on getting the information about the deceased having been brought to the hospital with stab injuries.

25. Having thus rejected all the grounds of attack pressed into service by the learned Counsel for the appellants for rejecting the evidence of PWs 8 & 9 we have no hesitation in arriving at the conclusion that the learned trial Court was fully justified in accepting the evidence of these witnesses and coming to the conclusion that the incident in which the deceased was stabbed did take place in the manner as has been deposed to by them in Court as well as what had been narrated in the FIR. Accused Lajpat @ Biloo has been rightly found to have stabbed the deceased with a knife on his chest as well as thigh. It has also been rightly accepted by the trial Court that the other three accused had caught hold of the deceased when he was stabbed by accused Lajpat.

26. We now come to the submission made on behalf of appellants Rajinder Kumar, Durga Prasad and Madan Gopal to the effect that even if the entire prosecution case as disclosed by the two eye witnesses during the trial is accepted to be true the conviction of these three accused for the murder of Amit cannot be sustained with the aid of Section 34 IPC as ordered by the trial Court. It was contended by the learned Counsel that it was the prosecution case itself that when the two eye witnesses had come out of their house on hearing the noise they had not seen accused Lajpat @ Biloo holding the knife in his hand and it had been categorically stated by PW-8 Praveen Gupta in cross-examination that accused Lajpat had suddenly taken out the knife from his pocket. Thus, counsel contended, it cannot be said that these three accused shared common intention with their co-accused Lajpat for committing the murder of the deceased Amit. As noticed already, the learned Counsel had cited some judgments of the Supreme Court in support of the argument that Section 34 IPC would not get attracted against these three accused just because of the fact that they had caught hold of the deceased. Learned Counsel had also pointed out that in one of those cases cited by them one of the accused had assaulted also the victim but still his conviction u/s 302/34 IPC was set aside by the Supreme Court and in another case the accused who had caught hold of the victim and had also exhorted co-accused to attack the victim was also acquitted of the charge of murder with the aid of Section 34. We have gone through those judgments (2001 SCC(Cr.) 668, 2000 SCC(Cr.) 9, 1999 SCC(Cr.) 74 and 1999 SCC(Cr.) 74). There is no doubt that in these cases the facts as were being projected by the appellants. counsel and the conclusions of the Supreme Court were also as was submitted by the counsel. However, just because the accused of those cases against whom the allegation was of catching hold of the victim were acquitted of the charge of murder accused Rajinder Kumar, Durga Prasad and Madan Gopal in the present case cannot seek acquittal solely relying upon these judgments cited on their behalf. There have been cases where even the accused who had simply caught hold of the victim while others were assaulting him were held guilty of murder with the aid of Section 34 IPC. Each criminal case has to be examined keeping in view the facts and circumstances of that particular case to find out if some accused other than the one who had actually caused injuries to the victim which finally caused death had also shared common intention with the actual assailant to cause the death of the person assaulted. On facts, there can hardly be any precedent in criminal cases. And this is what was held by the Supreme Court in a decision reported as Ramesh Singh @ Photti Vs. State of A.P., . In that case also the allegation against two accused who had been convicted for murder was that they had caught hold of the victim while the third accused had assaulted that victim. The Supreme Court went into the scope and ambit of Section 34 IPC in great detail and also considered the facts and the views laid down in its various earlier decisions including those which have been relied upon before us also on behalf of appellants Rajinder Kumar, Durga Prasad and Madan Gopal. We deem it appropriate to reproduce the relevant paragraphs of the said judgment before we examine the arguments advanced in the present case on the

applicability of Section

34. These are the relevant paras:

5. ...The learned Counsel then submitted the fact that the accused persons came together first time at 11 p.m. to the house of the deceased and went back annoyed and again came back together at 11.45 p.m. and called the accused outside and the appellants herein held the hands of the deceased long enough to facilitate A-1 to stab the deceased on the chest four times, itself indicated that these appellants also shared the intention of A-1 to cause the death of the deceased. The fact that none of the appellants either prevented or caused any act to dissuade or discourage or prevent A-1 from causing 4 blows on the chest of the deceased but helped him to do the said act itself is sufficient to draw the conclusion that these appellants also shared the common intention of A-1. In support of this contention as to applicability of Section 34 IPC the learned Counsel placed reliance in the case of Hamlet @ Sasi and Others Vs. State of Kerala, and Nandu Rastogi @ Nandji Rastogi and Another Vs. State of Bihar,

6.xxx

7. The learned Counsel then contended that the prosecution has failed to establish the fact that the appellant before us had shared the common intention of A-1 to commit the murder of the deceased. It is pointed out to us in this regard that the only overt act which is attributed to these appellants is that they held the hands of the deceased while A-1 stabbed the deceased. It is also pointed out from the evidence that these appellants did not carry any weapon nor did they in any manner exhort A-1 to assault. They even argued that there is no material to show that these appellants knew that A-1 was carrying a knife and that he would use the knife to cause the death of the deceased. In such circumstances, it is contended that Section 34 IPC would not apply to hold the appellants guilty of an offence punishable u/s 302 IPC with the aid of Section 34 IPC. It was the argument of the learned Counsel that to establish a case u/s 34 IPC, prosecution has to prove beyond all reasonable doubt that these appellants did have knowledge of the intention of A-1 and they voluntarily shared the said intention. It is also contended that apart from the above two factors prosecution has to establish that in furtherance of the said intention these appellants committed certain overt act which was responsible for the murder of the deceased. The further argument is that it is not any and every act during the course of attack on the deceased by these appellants that would indicate that these appellants shared the common intention, and only such overt act may be relevant which indicate that the appellants like A-1 also shared the intention to cause the death of the deceased. In the absence of such material no court can come to the conclusion that these appellants also shared the common intention of A-1 merely on the basis of their presence at the place of attack and their holding hands of the deceased. In support of this contention, the learned Counsel placed reliance on the judgment of this Court in Vencil Pushpraj v. State of Rajasthan (supra) and our attention was specially drawn to the facts as recorded

in the said judgment which showed that the appellant therein had pinned down the deceased till the other accused stabbed five times over the chest which resulted in the death of the victim, and after the attack the appellant and the co-accused who caused the fatal injuries ran away from the place of incident. But these facts were held to be insufficient in that case to hold the appellant guilty of an offence punishable u/s 302 read with Section 34 IPC. The learned Counsel for the appellants submitted that the facts of that case squarely cover the facts in this appeal therefore, the appellants are entitled to the benefit of doubt as was held in the said case of Pushpraj and these appellants also should be absolved of the charge of sharing the common intention.

8. Next judgment on which the learned Counsel for the appellants placed reliance was Ramashish Yadav and Ors. (supra) where this Court came to the conclusion that the mere fact that two accused persons came and caught hold of the deceased whereafter the two other accused attacked the deceased with gandasa blows did not indicate that the two accused who held the deceased had shared the common intention of the other accused who had inflicted the blows so as to attract Section 34 IPC.

9. Reliance was also placed on the judgment of this Court in the case of Ajay Sharma v. State of Rajasthan (supra). In this case this Court in a short judgment came to the conclusion that the accused persons who caught hold of the deceased and exhorted the co-accused to kill the deceased were not guilty of sharing the common intention of main accused because the exhortation "maro" did not mean to kill, therefore, the accused who was convicted with the aid of Section 34 IPC, could not have shared the common intention of the other accused.

10. The last judgment cited by the learned Counsel for the appellants in support of their argument of non-applicability of Section 34 IPC is that of Mithu Singh v. State of Punjab (supra). In that case, this Court held that the common intention has to be distinguished from same or similar intention on the basis of facts of each case. In that case, the Court came to the conclusion that simply because the appellant armed with the pistol went along with the accused to the place of the deceased did not indicate the common intention of the appellant therein of causing the death of the deceased.

11. A reading of the above judgments relied upon by the learned Counsel for the appellants does indicate that this Court in the said cases held that certain acts as found in those cases did not indicate the sharing of common intention. But we have to bear in mind that the facts appreciated in the above judgments and inference drawn have been so done by the courts not in isolation but on the totality of the circumstances found in those cases. The totality of circumstances could hardly be ever similar in all cases. Therefore, unless and until the facts and circumstances in a cited case is in pari materia in all respects with the facts and circumstances of the case in hand, it will not be proper to treat an earlier case as a precedent to arrive at a definite conclusion. This is clear from some judgments

of this Court where this Court has taken a different view from the earlier cases, though basic facts look similar in the latter case. For example, if we notice the judgment relied upon by the learned Counsel for the respondent i.e. the case of Hamlet alias Sasi v. State of Kerala (supra), this Court held that the fact that one accused held the deceased by his waist and toppled him down while the other accused attacked him with iron rods and oars was held to be sufficient to base a conviction with the aid of Section 34 IPC. The fact of holding the victim is similar in the cases of Vencil Pushpraj and Hamlet alias Sasi (supra) but the conclusions reached by this Court differ because the circumstances of the two cases were different. In Nandu Rastogi alias Nandji Rustogi and Anr. v. State of Bihar (supra) this Court held that to attract Section 34 IPC it is not necessary that each one of the accused must assault the deceased. It was held in that case that it was sufficient if it is shown that they had shared the common intention to commit the offence and in furtherance thereof each one of them played his assigned role. On that principle, this Court held that the role played by one of the accused in preventing the witnesses from going to the rescue of the deceased indicated that they also shared the common intention of the other accused who actually caused the fatal injury.

12. To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to guilty.... Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Yusuf Momin AIR 1971 SC 855).

13. Since common intention essentially being a state of mind and can only be gathered by inference drawn from facts and circumstances established in a given case, the earlier decisions involving almost similar facts cannot be used as a precedent to determine the conclusions on facts in the case in hand. This view of ours finds support in a judgment of this Court in Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, , wherein while considering the applicability of Section 34 IPC this Court held thus:

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (Sarkar's Evidence, 8th Edn., p. 30).

x x x x As we have said, each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another. x xx"

14. It is clear from the law laid down in the said case of Pandurang (supra) that however similar the facts may seem to be in a cited precedent the case in hand should be determined on facts and circumstances of that case in hand only and facts arising in the cases cited should not be blindly treated as a precedent to determine the conclusions in case in hand.

27. Now, we will refer to another case of a three Judge Bench of the Supreme Court in Suresh and Another Vs. State of U.P., wherein the only point referred to the three Judge Bench was regarding the applicability of Section 34 IPC to one of the accused of that case against whom the only allegation was that she had caught hold of one of the victims when he was assaulted by others. The Bench examined various decisions rendered in the past on the point and then gave its decision exonerating the concerned accused. We would like to reproduce here various paras from the judgment which would be kept in mind by us also while deciding the fate of appellants Rajinder Kumar, Durga Prasad and Madan Gopal. This is what the Supreme Court noticed about the role attributed to the concerned accused and the legal position and the final conclusion in respect of that accused(Pavitri Devi):

12. We will now deal with the role played by Pavitri Devi to see whether the court can interfere with the acquittal order passed in her favour by the High Court. PW-3 said that while he was sleeping the blood gushed out of the wounds sustained by his father reached his mouth and when he woke up he saw the incident. According to him, Pavitri Devi caught hold his mother's hair and pulled it up, thereafter she went outside and exhorted that everybody should be killed. But PW.1 and 2 did not support the aforesaid version pertaining to Pavitri Devi. According to them, when they reached the scene of occurrence Pavitri Devi was standing in front of the house of the deceased while the other two were inside the house engaged in the acts of inflicting blows on the victims.

13. The position which prosecution succeeded in establishing against A-3 Pavitri Devi is that she was also present at the scene of occurrence. Learned Counsel for

the State contended that such presence was in furtherance of the common intention of the three accused to commit the murders and hence she can as well be convicted for the murders u/s 302 IPC with the aid of Section 34 IPC. Mr. K.B. Sinha, learned Counsel contended that if Section 34 IPC is to be invoked as against Pavitri Devi the prosecution should have established that she had done some overt act in furtherance of the common intention.

14. We heard arguments at length on the ambit of Section 34 IPC. We have to consider whether the accused who is sought to be convicted with the aid of that Section, should have done some act, even assuming that the said accused also shared the common intention with the other accused.

Section 34 reads thus:

Acts done by several persons in furtherance of common intention.- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

15. xxx

16. In this context a reference to Section 35, 37 and 38 of IPC, in juxtaposition with Section 34, is of advantage. Those four provisions can be said to belong to one cognate group wherein different positions when more than one person participating in the commission of one criminal act are adumbrated. Section 35 says that when an act is done by several persons each of such persons who joins in the act with mens rea is liable for the act "in the same manner as if the act were done by him alone with that knowledge or intention". The section differs from Section 34 only regarding one postulate. In the place of common intention of all such persons (in furtherance of which the criminal act is done), as is required in Section 34, it is enough that each participant who joins others in doing the criminal act, has the required mens rea.

17. xxx

18. Hence, u/s 34 one criminal act, composed of more than one act, can be committed by more than one persons and if such commission is in furtherance of the common intention of all of them, each would be liable for the criminal act so committed.

19. xxx

20. xxx

21. Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34, e.g. the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common

intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why Section 34 cannot apply in the case of those two persons indicated in the illustrations.

22. Thus to attract Section 34 IPC two postulates are indispensable. (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

23. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.

24-28. xxx

29. Mr. Pramod Swarup, learned Counsel for the State invited our attention to the decision of this Court in *State of U.P. Vs. Iftikhar Khan and Others*, in which it is observed that to attract Section 34 IPC it is not necessary that any overt act should have been done by the co-accused. In that case four accused persons were convicted on a fact situation that two of them were armed with pistols and the other two were armed with lathis and all the four together walked in a body towards the deceased and after firing the pistols at the deceased all the four together left the scene. The finding of fact in that case was also the same. When a plea was made on behalf of those two persons who were armed with lathis that they did not do any overt act, this Court made the above observation. From the facts of that case it can be said that there was no act on behalf of the two lathi

holders although the deceased was killed with pistols alone. The criminal act in that case was done by all the persons in furtherance of the common intention to finish the deceased. Hence the observation made by Vaidialingam, J., in the said case has to be understood on the said peculiar facts.

30. It is difficult to conclude that a person, merely because he was present at or near the scene, without doing anything more, without even carrying a weapon and without even marching along with the other assailants, could also be convicted with the aid of Section 34 IPC for the offence committed by the other accused. In the present case, the FIR shows that A-3 Pavitri Devi was standing on the road when the incident happened. Either she would have reached on the road hearing the sound of the commotion because her house is situated very close to the scene, or she would have merely followed her husband and brother out of curiosity since they were going armed with axe and choppers during the wee hours of the night. It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three.

31. Mr. Pramod Swarup, learned Counsel for the State contended that if she remained at the scene without sharing the common intention she would have prevented the other two accused from doing the ghastly acts because both of them were her husband and brother respectively. The inaction of Pavitri Devi in doing so need not necessarily lead to the conclusion that she shared a common intention with others. There is nothing to show that she had not earlier tried to dissuade her husband and brother from rushing to attack the deceased.

32. Thus we are unable to hold that Pavitri Devi shared common intention with the other accused and hence her remaining passively on the road is too insufficient for reversing the order of acquittal passed by the High Court in order to convict her with the aid of Section 34 IPC.

33-48. xxx"

49. ...Even a person not doing any particular act but only standing guard to prevent any prospective aid to the victims may be guilty of common intention. However, it is essential that in case of an offence involving physical violence it is essential for the application of Section 34 that such accused must be physically present at the actual commission of crime for the purposes of facilitating accomplishment of "criminal act" as mentioned in that section.....The presence of those who in one way or the other facilitate the execution of the common design itself tantamounts to actual participation in the "criminal act". The essence of Section 34 is simultaneously consensus of the minds of persons participating in the criminal action to bring about a particular result....

50-56. xxx

And in the concluding para of the judgment while noticing the role attributed to the accused sought to be convicted for the offence of murder with the aid of

Section 34 IPC the Court held as under:

57. However, in this case on facts, the prosecution has not succeeded in proving that A3 Pavitri Devi shared the common intention with the other two accused persons, one of whom was her husband and the other her brother. It has come in evidence that when the witnesses reached on the spot, they found the said accused standing on the road whereas the other accused were busy committing the crime inside the house. The exaggerated version of PW3 regarding the participation of Pavitri Devi by allegedly catching hold of his mother's hair cannot be accepted as PWs 1 and 2 have not supported the aforesaid version. The High Court was, therefore, justified in holding that Pavitri Devi, A3 did not share the common intention with the other accused persons. By her mere presence near the place of occurrence at or about the time of crime in the absence of other evidence, direct or circumstantial, cannot hold her guilty with the aid of Section 34. But in case the prosecution had succeeded in proving on facts of her sharing of common intention with A1 and A2, she could not be acquitted of the charge framed against her only on the ground that she had actually not done any overt act. The appeal of the State filed against Pavitri Devi has no merit and has thus rightly been dismissed by Brother Thomas, J.

28. So, the position which emerges from a reading of these two judgments of the Apex Court is that an accused can be convicted with the aid of Section 34 IPC even if no overt act is attributed to that accused and merely on the basis of his presence at the scene of crime while some crime was being committed by his associates provided the prosecution is able to show that the accused present at the scene of crime and sought to be convicted with the aid of Section 34 was sharing common intention with other accused who had actually participated in the crime.

29. Now, keeping in mind the said legal position we shall examine the facts of the case in hand to find out if accused Rajinder Kumar, Durga Parsad and Madan Gopal had shared common intention with accused Lajpat @ Billoo to commit the murder of the deceased Amit Gupta. All the four accused persons were present outside the house of the complainant around 10.30 p.m. on the wintry night of January, 1997. They have not offered any explanation as to what they were doing there at that time of the night. It is their own case that there was some enmity between the deceased and accused Lajpat and Madan Gopal which had developed during their stay together in the jail in connections with some cases. Accused Rajinder Kumar and his brother Durga Parsad have also claimed that there was some litigation going on between them and the father of the deceased. So, all the four accused had some grudge against the complainant party. Accused Rajinder Kumar, Durga Parsad and Madan Gopal have also not said anything in their statements u/s 313 Cr.P.C. as to why they had caught hold of the deceased after he had come out of his house n being called from outside if it was not to facilitate the stabbing of the deceased by their co-accused Lajpat. They did not even stop Lajpat from inflicting second knife blow on the body of the deceased. If

they were really not aware that Lajpat was carrying a knife and he had suddenly taken out the same from his pocket and they had no common intention to share with Lajpat in the stabbing they would have atleast immediately attempted to prevent him from stabbing the deceased. They did not do that and only on seeing the father and brother of the deceased coming towards them that they alongwith Lajpat ran away from the scene of crime together. From the afore-said other circumstances noticed it is clear that all the four accused had gone to the house of the deceased with a pre-concerted plan and common intention to kill the deceased that day. So, accused Rajinder Kumar, Durga Parsad and Madan Gopal cannot escape from conviction for the offence of the murder of the deceased. Section 34 IPC qua them is squarely attracted in the facts and circumstances of the case. All the four accused have to sink together.

30. We, therefore, do not find any merit in any of these appeals and accordingly the same are dismissed. The sentence of imprisonment of appellants Rajinder Kumar, Durga Parsad and Madan Gopal was suspended during the pendency of the appeals and now that their appeals stand rejected their bail bonds stand cancelled and they shall be taken into custody forthwith to be kept in jail for the rest of their life.